No. 91-1521

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

LOWELL GREEN

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether *Edwards* v. *Arizona*, 451 U.S. 477 (1981), requires the suppression of a voluntary confession because law enforcement officers initiated interrogation of the suspect five months after he invoked his right to counsel in connection with an unrelated offense, where the suspect consulted with counsel and pleaded guilty to the unrelated offense prior to the interrogation.

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a-18a) is reported at 592 A.2d 985.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1991. A petition for rehearing was denied on November 25, 1991. Pet. App. 34a-35a. On February 11, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 24, 1992. The petition was filed on March 20, 1992, and was granted on May 18, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in part: "No person * * * shall be compelled in any criminal case to be a witness against himself."

STATEMENT

1. On July 18, 1989, officers of the District of Columbia Metropolitan Police Department arrested respondent Lowell Green on drug charges. The officers gave respondent a printed advice-of-rights form known as a "PD 47." In response to the printed question whether he was willing to talk to the police without having an attorney present, respondent wrote "No." The officers did not attempt to question him. Pet. App. 2a.

Respondent appeared in court the following day, and an attorney was appointed to represent him. On July 28, 1989, the drug charges were dismissed at the preliminary hearing. Respondent remained in custody because of an unrelated juvenile matter. Pet. App. 2a.

In August 1989, respondent was indicted on charges of possessing a controlled substance with intent to distribute it arising out of respondent's July 18, 1989, arrest. On September 27, 1989, he entered a plea of guilty to the lesser included offense of attempted possession of a controlled substance with intent to distribute it. Pet. App. 2a.

Respondent remained in custody awaiting sentencing on the drug charge.[1] On January 4, 1990, a

[1] Respondent was held in the Youth Center at Lorton Reformatory while a study was performed to determine his suitability for treatment under the District of Columbia Youth Rehabilitation Amendment Act of 1985. Pet. App. 2a; see D.C. Code Ann. § 24-803(e) (1989). On February 26, 1990, respondent was sentenced to 15 months' incarceration under the Youth Rehabilitation Act. Pet. App. 2a.

Metropolitan Police Department detective obtained an arrest warrant charging respondent with the unrelated 1988 murder of Cheaver Herriott. The next day, officers brought respondent to the Police Department's Homicide Office for booking. The officers advised respondent of his *Miranda* rights, and he agreed to waive those rights. Respondent discussed his involvement in the murder of Herriott with the officers, and they again advised him of his rights. Respondent then made a videotaped statement in which he confessed to his involvement in the robbery and murder. Pet. App. 3a.

2. Respondent was indicted for murder. He moved to suppress his confession, claiming that it was involuntary and that it had been obtained in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981).

The trial court initially denied respondent's motion. Pet. App. 19a-30a. The court first rejected respondent's contention that his confession was involuntary. After hearing testimony from Detective Donald Gossage of the Metropolitan Police Department and from respondent concerning the circumstances surrounding respondent's waiver of his *Miranda* rights, the trial court found that "as between those two accounts, that is the account given by [respondent] and Detective Gossage, the Court credits Detective Gossage's account." Pet. App. 20a. The trial court stated:

> Having made this credibility finding which leads the Court to conclude that [respondent] was brought to the Homicide Office of the police department, was given his Miranda Rights in the way in which Detective Gossage testified they were given on the stand, that [respondent] un-

> derstood his rights and that he appreciated them and thereafter waived them, the Court finds no basis to suppress any of these statements on the ground that they were given in violation of Miranda or were involuntarily made.

Id. at 21a-22a.

With respect to respondent's *Edwards* claim, the court noted that an "extraordinary amount of time" had elapsed between respondent's invocation of his right to counsel and his confession, and that respondent had had an opportunity to consult with counsel during that time. Pet. App. 25a. Under those circumstances, the court concluded that "none of the reasons which underlie the [Supreme] Court's decision[s] which have addressed a criminal defendant's right to [counsel] under the [Sixth] Amendment and his right not to incriminate himself under the [Fifth] Amendment, would be served by suppression of these statements." *Id.* at 26a.

Five days after the trial court's ruling, this Court decided *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990). In light of that decision, the trial court reconsidered its ruling on respondent's *Edwards* claim and ordered that respondent's confession be suppressed. Pet. App. 31a-33a.

3. The District of Columbia Court of Appeals affirmed. Pet. App. 1a-18a. The court acknowledged that this case differs from *Edwards* and other cases decided by this Court in several ways.

First, the interrogation concerned an unrelated crime and took place after respondent had consulted with a lawyer. Pet. App. 6a-8a. The court noted, however, that the second factor was present in *Minnick*, and the first factor was present in *Arizona* v. *Roberson*, 486 U.S. 675 (1988). The court therefore

concluded that *Minnick* and *Roberson* required the court to reject the government's reliance on those factors. In the court's view, to admit the challenged evidence in this case would require that *Minnick* and *Roberson* be "narrow[ed] * * * to their individual settings." Pet. App. 7a.

Second, the court recognized that this case differs from the *Edwards* line of cases because there was a five-month interval between respondent's invocation of the *Edwards* right to counsel and the subsequent interrogation. Pet. App. 8a-12a. The court stated that "[t]here is no question" that the danger of police badgering that the *Edwards* rule is designed to prevent "is reduced when the police have made no effort to interrogate the defendant for more than five months after his assertion of rights." *Id.* at 8a-9a. Although the court viewed as "substantial" the government's arguments against a "perpetual irrebuttable presumption," *Id.* at 9a, 11a (quoting *Minnick*, 111 S. Ct. at 496 (Scalia, J., dissenting)), it concluded that "only the Supreme Court can explain whether the *Edwards* rule is time-tethered." Pet. App. 11a.

Third, the court recognized that before the interrogation, respondent pleaded guilty to the offense with which he was charged when he invoked the *Edwards* right. Pet. App. 12a-14a. The court noted (*id.* at 12a) that this "might seem to be [the government's] most potent argument" for distinguishing *Edwards*, and that cutting off the irrebuttable presumption of *Edwards* when a defendant pleads guilty "promises adherence to the requirement of some form of bright-line rule." *Ibid.* The court nevertheless concluded that a plea of guilty "is consistent with [the defendant's] election to communicate with the police only through counsel," and that therefore the

continued application of the prophylactic rule of *Edwards* was necessary in the circumstances of this case. *Id.* at 14a.

The court observed that "it is not unfair to question the logic of a presumption that renders invalid an otherwise knowing, intelligent and voluntary waiver of *Miranda's* auxiliary protections—and so demands exclusion of a murder confession voluntary in fact—because over five months earlier, in connection with an unrelated crime, the defendant asked for (and was afforded) the assistance of counsel." Pet. App. 14a-15a. The court added that, if it had reached the wrong result, "then it is for the [Supreme] Court in this case or some future one to provide the *Leitfaden*—the red thread—through its decisions leading to the correct result." *Id.* at 15a.[2]

Judge Steadman dissented. Pet. App. 16a-18a. He reasoned that the irrebuttable presumption of *Edwards* should not continue to apply after a suspect waives his Fifth Amendment right against compulsory self-incrimination and pleads guilty to the offense that prompted the invocation of the *Edwards* right. He noted that a guilty plea represents "a sea change in th[e] circumstances which existed at the time the right to counsel was originally invoked."

[2] The court noted (Pet. App. 5a n.2) that "[o]n appeal [respondent] does not argue the constitutional involuntariness of the confession as an alternative ground supporting the suppression ruling." The court of appeals nevertheless stated (*id.* at 14a) that respondent made a "knowing, intelligent and voluntary waiver of *Miranda's* auxiliary protections." In addition, the court of appeals rejected respondent's contention that the government delayed unnecessarily in bringing him to court for arraignment on the murder charge. *Id.* at 4a-5a n.2. Finally, the court held (*id.* at 3a-4a n.1) that this case presents "no issue of violation of [respondent's] right to counsel under the Sixth Amendment."

Pet. App. 16a. Indeed, a guilty plea "entail[s] a knowing, voluntary, and intelligent waiver of the Fifth Amendment right against self-incrimination and its consequent concerns—the very right that *Edwards* seeks to protect." *Id.* at 18a.

The government's petition for rehearing en banc was denied by an equally divided vote. Pet. App. 34a-35a.

SUMMARY OF ARGUMENT

More than five months after respondent invoked his *Edwards* right to counsel—and after he consulted with counsel and pleaded guilty to the offense that prompted his invocation of the *Edwards* right—respondent confessed to his involvement in an unrelated murder. Both courts below concluded that respondent's confession was voluntary, knowing, and intelligent, and there is no indication that the confession was the product of any form of police misconduct. The court of appeals nevertheless believed that this Court's decisions in *Miranda* v. *Arizona*, *Edwards* v. *Arizona*, *Arizona* v. *Roberson*, and *Minnick* v. *Mississippi* required it to suppress respondent's confession.

Those decisions established a series of prophylactic rules designed to protect the Fifth Amendment privilege against compelled self-incrimination in the context of custodial interrogation. The Court has justified the creation of each of those rules on the ground that it protects the suspect against the inherently coercive pressures of interrogation in a police-dominated setting. The Court has emphasized that the scope of each of those prophylactic rules must be determined by reference to the purposes that justify the rule. In general, compliance with *Miranda* ensures that a suspect's decision to speak to the police is the product of a knowing, intelligent, and volun-

tary choice. The *Edwards* rule adds a second layer of prophylactic protection. It creates an irrebuttable presumption of coercion, but only in circumstances in which the risk of coercion is so great as to make such a presumption appropriate.

The Court has never held that the *Edwards* rule permanently bars a suspect who invokes the right to the presence of counsel during custodial interrogation from waiving that right at the request of the police. So sweeping an approach would expand the *Edwards* rule far beyond its prophylactic purposes. Rather, in each of the cases in which it has applied the *Edwards* rule, the Court has assured itself that the circumstances presented a very real risk of coercion. This case, however, differs from this Court's previous cases in several critical respects, which indicate that *Edwards*' irrebuttable presumption of coercion should have no application here.

First, respondent entered a plea of guilty to the charge that prompted his invocation of the *Edwards* right to counsel before the police initiated interrogation. A defendant's decision to plead guilty marks a break in the suspect's status as a pretrial arrestee. In addition, it represents a waiver of the defendant's Fifth Amendment privilege against compelled self-incrimination. A suspect who has waived his Fifth Amendment privilege and pleaded guilty is unlikely to feel badgered if the police subsequently approach him, repeat the *Miranda* warnings, and seek to question him about an unrelated offense. Just as a break in custody dissolves the *Edwards* presumption, a guilty plea so alters an arrestee's situation that courts should not continue to presume, irrebuttably, that the arrestee wishes to deal with the police only through counsel. In such circumstances, the prophylactic rules of *Miranda* suffice to ensure that suspects do

not give statements to police unless they freely choose to do so.

Second, more than five months elapsed between respondent's assertion of the *Edwards* right to counsel and the initiation of interrogation by the police. In *Edwards* itself, and in this Court's subsequent decisions applying *Edwards*, the police reinitiated interrogation within a short time after the suspect's request for counsel. Where months have passed without any effort by the police to question the suspect, however, there is no reason to presume that a suspect will feel badgered by a police inquiry into whether the suspect wishes to speak to them without counsel. A perpetual irrebuttable presumption that a suspect who has once invoked his *Edwards* right to counsel may never be approached by the police as long as he remains in custody would result in the suppression of entirely voluntary confessions without advancing the purposes underlying the *Edwards* rule.

Third, the police initiated the interrogation only after respondent had been provided with counsel and had consulted with his lawyer, and the questioning concerned a crime wholly unrelated to the offense that prompted respondent's invocation of the *Edwards* right. Thus, this case is unlike both *Arizona* v. *Roberson*, in which the police reinitiated interrogation without honoring the suspect's request for counsel, and *Minnick* v. *Mississippi*, in which the renewed interrogation concerned the same offense that prompted the suspect's invocation of the *Edwards* right. When a suspect's prior invocation of the right to counsel has been honored, *and* he is later approached by the police about a different offense, he will likely understand that he is not being badgered, but is simply being asked, in the context of the new offense, to make an initial election as to whether he

will discuss the new matter with the police alone, or only in the presence of counsel.

Because the prophylactic rules of *Miranda* and *Edwards* are not constitutionally required, the Court has carefully weighed the benefits of those rules against their costs in restricting police investigations and excluding voluntary confessions from evidence. The costs are clear. *Miranda* and *Edwards* result in the suppression of uncoerced confessions that, in many cases, may be essential to the successful prosecution of crime. The costs are magnified by the court of appeals' decision, which effectively imposes a perpetual ban on any police-initiated interrogation of a suspect in custody who has invoked his *Edwards* right to counsel. Because many offenders commit multiple crimes, such a rule would extend the exclusionary rule of *Edwards* in a way that would seriously impede effective law enforcement.

The countervailing benefits of such an extension of *Edwards* would be minimal. A person in respondent's position already has the protection of *Miranda* warnings. He is thus unlikely to feel badgered to speak with the police when they approach him long after his invocation of the *Edwards* right to counsel, seeking to question him about an unrelated crime. Any additional protection of the Fifth Amendment privilege that might result from applying the *Edwards* rule in that context is far outweighed by the high costs that such an application would impose on society.

ARGUMENT

THE *EWARDS* RULE SHOULD NOT APPLY TO AN INTERROGATION CONDUCTED FIVE MONTHS AFTER THE SUSPECT INVOKED THE RIGHT TO COUNSEL IN CONNECTION WITH AN UNRELATED OFFENSE, WHERE THE SUSPECT HAS CONSULTED WITH COUNSEL AND PLEADED GUILTY TO THAT OFFENSE PRIOR TO THE INTERROGATION

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court concluded that custodial interrogation generates "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467. To counteract those pressures, the Court devised a set of prophylactic rules designed to protect the Fifth Amendment privilege in the context of custodial interrogation. The Court held that before conducting custodial interrogation, the police must advise a suspect of his right to remain silent, his right to consult with counsel and have counsel present during interrogation, and his right to have counsel appointed for him if he is indigent. In addition, the police must inform the suspect that if he waives those rights and makes a statement, anything he says may be used against him in court. 384 U.S. at 467-473. Those procedures are necessary, the Court concluded, to ensure that the coercive pressures of custodial interrogation do not lead a suspect to relinquish his privilege against compulsory self-incrimination "where he would not otherwise do so freely." *Id.* at 467.

Fifteen years later, in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), the Court announced an additional prophylactic rule for cases in which the suspect invokes his right to have counsel present during cus-

todial interrogation. The Court held that following such a request, a suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485.

In subsequent decisions, the Court has elaborated further upon the prophylactic rules established in *Miranda* and *Edwards*. In *Arizona* v. *Roberson*, 486 U.S. 675 (1988), the Court extended the principle of *Edwards* to interrogations conducted in the course of separate investigations, holding that a suspect's request for counsel bars subsequent police-initiated custodial interrogation "[w]hether [the] reinterrogation concerns the same or a different offense." *Id.* at 683-685, 687. And in *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990), the Court held that permitting a suspect who has requested counsel to consult with his lawyer before reinitiating custodial interrogation is not sufficient to satisfy the *Edwards* rule. Instead, the Court held that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* at 491.

The court of appeals felt constrained by the prophylactic rules established in *Miranda*, *Edwards*, *Roberson*, and *Minnick* to suppress respondent's confession. The court did so even though the police questioned respondent about an offense unrelated to the one that prompted his invocation of the *Edwards* right to counsel: even though more than five months passed between his invocation of the *Edwards* right and his interrogation; and even though respondent had consulted with counsel and pleaded guilty to the initial

offense before the police approached him for questioning with respect to the second offense. Because applying the *Edwards* rule in the circumstances of this case would not advance the purpose underlying that rule, the courts below erred in suppressing respondent's confession.[2]

1. The *Edwards* rule, like other applications of *Miranda*, "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." *Connecticut* v. *Barrett*, 479 U.S. 523, 528 (1987). The Court has repeatedly stated that the justification for the prophylactic rules established in *Edwards* and the cases following it is the need to "prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2208 (1991) (quoting *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990)); see *Minnick* v. *Mississippi*, 111 S. Ct. at 489; *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984); *Oregon* v. *Bradshaw*,

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[2] The Sixth Amendment right to counsel is not at issue in this case. The Sixth Amendment right attaches only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *United States* v. *Gouveia*, 467 U.S. 180, 188 (1984) (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). At the time respondent invoked his right to counsel, adversary judicial criminal proceedings had not been initiated on the murder charge—or, for that matter, on the unrelated drug charges. Although respondent's Sixth Amendment right to counsel on the drug charges had attached at the time he waived his *Miranda* rights, the Sixth Amendment right did not extend to the unrelated murder charge at issue in this case. See *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2207-2208 (1991) (Sixth Amendment right to counsel is "offense-specific").

462 U.S. 1039, 1044 (1983). The concern underlying the *Edwards* rule is that "[i]n the absence of such a bright-line prohibition, the authorities * * * might * * * wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. at 98. And because the *Edwards* rule establishes a second layer of prophylaxis on top of the protections provided by *Miranda*, the Court has applied *Edwards* only in circumstances where the Court has perceived a substantial risk of coercion.

The Court has never held that the *Edwards* rule permanently bars a suspect who invokes the right to the presence of counsel during custodial interrogation from waiving that right at the request of the police.[4] Such a permanent, irrebuttable presumption would sweep far more broadly than necessary to protect the Fifth Amendment privilege. Several factors distinguish this case from the Court's previous *Edwards* decisions. Taken singly or in conjunction, those factors indicate that it is highly unlikely that the reinitiation of police questioning wore down respond-

[4] It is true that there is language in this Court's previous decisions that, if interpreted without regard to the factual settings in which those cases arose, could be read to suggest that the *Edwards* presumption lasts in perpetuity, or at least for so long as the suspect remains in custody. See *Minnick*, 111 S. Ct. at 491; *Edwards*, 451 U.S. at 482. But "words of * * * opinions are to be read in the light of the facts of the case." *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944). Moreover, the Court has emphasized that its prophylactic rules should not be read so broadly, but rather must be understood in light of the prophylactic purposes that justify them. See *Connecticut* v. *Barrett*, 479 U.S. at 528.

ent and induced him to confess. For that reason, there is no justification for applying the irrebuttable presumption of the *Edwards* rule.

a. First, this case differs from the Court's previous *Edwards* cases because a pivotal event intervened between respondent's invocation of his *Edwards* right and the police interrogation: prior to the interrogation about the murder, respondent entered a plea of guilty to the drug charge that had prompted his invocation of the *Edwards* right to counsel.

A guilty plea "represents a break in the chain of events which has preceded it in the criminal process," *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), and constitutes a waiver of the Fifth Amendment right not to be compelled to incriminate oneself. *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969); *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969).

> Central to the [guilty] plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself [even though] he is shielded by the Fifth Amendment from being compelled to do so.

Brady v. *United States*, 397 U.S. 742, 748 (1970).

Because a guilty plea marks a sharp break in the proceedings, and because a guilty plea constitutes a waiver of the same Fifth Amendment right that is protected by the *Miranda* and *Edwards* rules, it does not make sense automatically to treat a defendant who has pleaded guilty as if he were still a pretrial arrestee. To the contrary, the entry of a guilty plea to the charge as to which the defendant invoked his *Edwards* right should be sufficient to lift the irre-

buttable presumption that any subsequent waiver of that right is the product of police coercion.

In this case, the court of appeals applied the *Edwards* presumption despite respondent's guilty plea, because it concluded that respondent's decision to plead guilty to the drug charge was not necessarily inconsistent with a continuing desire to "deal with government officials only through an attorney." Pet. App. 14a. We agree with the court of appeals that a guilty plea is not necessarily inconsistent with a continuing desire to deal with the government only through counsel. But we disagree with the court's implicit conclusion that the *Edwards* presumption can be rebutted only by an event that conclusively establishes that a suspect has decided to speak with the police in counsel's absence.

The fallacy of that position is demonstrated by the generally accepted principle that the *Edwards* presumption does not survive a break in custody. See *McNeil* v. *Wisconsin*, 111 S. Ct. at 2208 (*Edwards* rule applies "assuming there has been no break in custody"); *Dunkins* v. *Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988), cert. denied, 489 U.S. 1059 (1989); *McFadden* v. *Garraghty*, 820 F.2d 654, 661 (4th Cir. 1987); *United States* v. *Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983). A break in custody, like a guilty plea, does not conclusively establish that the suspect now wishes to speak to the police directly. Indeed, a suspect who has invoked the *Edwards* right to counsel and subsequently been released from custody may well be inclined to adopt the same course if he is subsequently taken into custody and questioned. The courts nevertheless have concluded that the Fifth Amendment privilege does not require the auxiliary protection of the *Edwards* rule following a break in custody. The reason a break in custody ends the *Edwards* presumption thus is not because it conclusively establishes that a suspect will thereafter wish to speak to the police, but rather because it is so dramatic a change in circumstances that it is no longer reasonable irrebuttably to presume the contrary.

The "break in custody" cases are merely specific examples of a broader point: the irrebuttable presumption from *Edwards* should not apply when there is a significant change in the accused's status prior to the interrogation. In each of the cases in which this Court has applied *Edwards* to require suppression of a confession, the accused was a pretrial arrestee both when he invoked his *Edwards* right to counsel and when the police reapproached him. In that setting, the Court concluded that there was no objective reason to believe that the accused would take a different view of whether he should speak with the police outside the presence of counsel. Where the status of the accused has changed dramatically, as it does once he is released from custody or after an adjudication of guilt (whether after a guilty plea or after trial), the assumption that he wishes to have the assistance of counsel in all of his dealings with the police is much less compelling. In a case such as this one, the relevant question is therefore not whether an intervening plea of guilty conclusively establishes that a suspect wishes to speak to the police directly, but whether such a plea renders unreasonable the continued application of *Edwards*' irrebutable presumption that a subsequent decision to speak with the police on their request is the product of coercion, rather than a knowing, intelligent, and voluntary decision by the suspect.

In sum, there is no justification for continuing to apply the *Edwards* presumption once a suspect's request for counsel has been honored and he has entered a guilty plea to the charges that prompted him to invoke the right to counsel. Because a guilty plea marks the end of the investigative process that led to the suspect's invocation of his *Edwards* right, and because the plea reflects the defendant's willingness to waive his Fifth Amendment right with regard to the charged offense, the police should be permitted to approach the subject, repeat the *Miranda* warnings, and seek to determine if he would now like to speak with them about an unrelated offense. If the suspect is still unwilling "to communicate with the police except through an attorney, he can simply tell them that when they give him the *Miranda* warnings." *McNeil* v. *Wisconsin*, 111 S. Ct. at 2210. In those circumstances, the prophylactic rule of *Miranda* suffices to ensure that suspects do not give statements to the police unless they freely choose to do so.

b. A second, and related, factor distinguishing this case from previous *Edwards* decisions is the "extraordinary amount of time" that elapsed between respondent's invocation of his right to counsel and his confession. Pet. App. 25a. The Court's previous decisions applying the *Edwards* rule have involved repeated police-initiated questioning within a short time after a suspect's arrest. In *Edwards* itself, the police officers reinitiated interrogation only one day after the suspect invoked his right to counsel. See 451 U.S. at 478-479. In both *Minnick* and *Roberson*, only three days elapsed between the suspect's invocation of the right to counsel and the reinitiation of

interrogation. See 111 S. Ct. at 488-489; 486 U.S. at 678.[5]

Unlike the suspects in this Court's previous *Edwards* cases, respondent was not subjected to repeated police-initiated interrogation within a period of a few days. To the contrary, the police made no effort to question respondent for more than five months after his assertion of the *Edwards* right. The initiation of interrogation five months after a suspect invokes his right to counsel in no way resembles the "persistent attempts by officials to persuade [a suspect] to waive his rights" that the *Edwards* rule is designed to prevent. See *Minnick* v. *Mississippi*, 111 S. Ct. at 491. Consequently, it does not make sense to treat a suspect who has been in custody for months the same as a pretrial arrestee who recently was subject to police interrogation and asserted the *Edwards* right.

A suspect approached for questioning only twice in five months is unlikely to feel "badgered" by the police. Similarly, the suspect is unlikely to conclude from the second approach that the police were not serious about the suspect's right to request that counsel be present during questioning and that they intend to proceed with questioning without regard to the suspect's desire for counsel. Cf. *Minnesota* v. *Murphy*, 465 U.S. 420, 433 (1984) ("[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is ob-

[5] See also *Smith* v. *Illinois*, 469 U.S. at 98-99 (*Edwards* rule was violated where, after suspect requested counsel during administration of *Miranda* warnings, police officer immediately proceeded to finish advising suspect of his *Miranda* rights and then pressured suspect to answer questions without an attorney); *Solem* v. *Stumes*, 465 U.S. 638,

tained."). Because application of the *Edwards* rule in this context would not promote the rule's anti-badgering purpose, there is no justification for indulging the irrebuttable presumption that the officers' inquiry into whether the suspect wishes to speak to them without counsel will overbear the will of the suspect and compel him to speak when he would otherwise remain silent.

Citing this Court's "emphasis on the need for a bright-line rule in this area," Pet. App. 11a, the court of appeals felt constrained to hold that the prophylactic rules established in *Edwards*, *Roberson*, and *Minnick* barred the police from reinitiating interrogation of respondent on any subject for as long as he remained in custody, despite the intervening circumstances of his consultation with counsel and entry of a guilty plea. To be sure, a rule that the *Edwards* presumption lasts forever, or at least as long as the suspect remains in custody, has at least the appearance of clarity.[6] This Court has recog-

612 (1984) (assuming, for purposes of deciding whether *Edwards* would be applied retroactively, that police violated *Edwards* rule when they twice reinitiated custodial interrogation within one day after suspect invoked right to counsel).

[6] Although such a rule can be clearly stated, it has other features that make it ill-suited to serve as a bright-line guide to police as they perform their investigative functions. Many suspects commit multiple crimes, and persons in long-term custody often become suspects in other offenses. Moreover, suspects or prisoners are often transferred from one jail or prison to another, and may at different times be questioned by officers from various local, state, or federal law enforcement agencies. It is one thing to require the police to determine whether a suspect has recently invoked the right to counsel under *Miranda*. See *Roberson*, 486 U.S. at 687-688. It is quite another to require the police to determine whether a suspect in long-term custody has ever invoked the *Edwards* right at any time, in any place,

nized, however, that prophylactic rules should be " 'clear and unequivocal' * * * only when they guide sensibly." *McNeil* v. *Wisconsin*, 111 S. Ct. at 2211. See also *New York* v. *Quarles*, 467 U.S. 649, 658 (1984) (adopting exigent circumstances exception to *Miranda* even though the exception "to some degree * * * lessen[s] the desirable clarity of that rule"). In *Michigan* v. *Mosley*, 423 U.S. 96, 104, 107 (1975), the Court concluded that police officers "scrupulously honored" the suspect's assertion of the right to silence when they "suspended questioning entirely for a significant period before beginning the interrogation that led to [the suspect's] incriminating statement." Although the Court's approach in *Mosley* blurred the bright-line quality of the *Miranda* rules to some extent, the Court made clear that *Mosley* rests on the same concern that underlies *Edwards*' rule prohibiting the reinitiation of interrogation following a suspect's invocation of the right to counsel—the danger that the police will "persist[] in repeated efforts to wear down [the suspect's] resistance and make him change his mind." 423 U.S. at 105-106. Consequently, ly, in the *Edwards* context, as well as the context of a suspect who asserts the right to remain silent, imposing "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity." *Mosley*, 423 U.S. at 102. Thus, at least when more than a few days have passed since the suspect's invocation of his *Edwards*

during any interrogation by any police officer. Consequently, whatever the facial clarity of a perpetual *Edwards* rule, it would be extraordinarily difficult to apply as a guide to police conduct.

right, and when the suspect is not simply continuing to be held on the strength of his initial arrest, the irrebuttable presumption of *Edwards* should give way.[7]

c. Finally, this case differs from the Court's earlier *Edwards* rulings because respondent was approached by the police concerning the murder only after his previous request for counsel in connection with the drug offense had been honored. Respondent was provided with counsel and had consulted with his lawyer months before the police sought to question him about the murder, which was wholly unrelated to the drug charge that had prompted his invocation of the *Edwards* right. Thus, this case is unlike either *Arizona* v. *Roberson*, in which the police reinitiated interrogation without honoring the suspect's request for counsel, or *Minnick* v. *Mississippi*, in which the renewed interrogation concerned the same offense

[7] See *United States* v. *Hall*, 905 F.2d 959, 963 (6th Cir. 1990) ("neither *Edwards* nor *Roberson* can be interpreted * * * to grant * * * a blanket protection continuing *ad infinitum*"), cert. denied, 111 S. Ct. 2858 (1991); 905 F.2d at 965 (Ryan, J., concurring) (presumption that waiver of *Miranda* rights was the product of inherently compelling pressures of custodial interrogation rebutted when three months elapsed between assertion of *Edwards* right to counsel and reinitiation of interrogation); *State* v. *Newton*, 682 P.2d 295, 298 (Utah 1984) (*Edwards* presumption rebutted where three months elapsed between first and second interrogation, counsel was made available to the defendant in the interim, and renewed questioning concerned an unrelated offense). But see *Kochutin* v. *State*, 813 P.2d 298, 304 (Alaska Ct. App. 1991) (applying *Edwards* rule despite one-year interval between invocation of right to counsel and police-initiated interrogation); *Walker* v. *State*, 573 So. 2d 415, 416 (Fla. Dist. Ct. App. 1991) (suggesting that *Edwards* rule could remain in effect "for the rest of the [suspect's] life"), vacated and remanded, 112 S. Ct. 1927 (1992).

that had prompted the suspect's invocation of the right to counsel. The fact that counsel had been made available to respondent eliminated the coercive pressures that arise when police reinitiate custodial interrogation of a "suspect who has been denied the counsel he has clearly requested." See *Roberson*, 486 U.S. at 686 & n.6. And the fact that the questioning concerned an unrelated offense greatly reduced the possibility that respondent would be badgered into making a statement by repeated police-initiated questioning. See *Minnick*, 111 S. Ct. at 491 (discussing "persistent attempts by officials to persuade [suspects] to waive [their] rights").

When a suspect's request for counsel has been honored *and* the renewed questioning concerns an offense that is unrelated to the one that prompted the request, the suspect is much less likely to perceive the reinitiation of interrogation as badgering by the police. Instead, the suspect will likely understand that he is simply being asked, in the context of the new offense, to make "an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988). If the suspect "'knowingly and intelligently' pursues the latter course," there is "no reason why the uncounseled statements he then makes must be excluded at his trial." *Ibid.*

2. Because the prophylactic rules of *Miranda* and *Edwards* "sweep[] more broadly than the Fifth Amendment itself," *Oregon* v. *Elstad*, 470 U.S. 298, 306-307 (1985), and thus inevitably result in the suppression of some voluntary confessions, this Court has carefully weighed the benefits of expanding such rules against the costs of restricting police investigations and excluding voluntary confessions from

evidence. See, *e.g.*, *New York* v. *Quarles*, 467 U.S. 649, 657 (1984); *Michigan* v. *Tucker*, 417 U.S. 433, 450-451 (1974). The Court has recognized that " 'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted. * * * Admissions of guilt are more than merely 'desirable' * * *; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986); see also *McNeil* v. *Wisconsin*, 111 S. Ct. at 2210 ("the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good"); *Oregon* v. *Elstad*, 470 U.S. at 305; *United States* v. *Washington*, 431 U.S. 181, 186-187 (1977); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). Confessions, if obtained by fair methods that guarantee their reliability, result in the resolution of many cases that could not otherwise be solved, ensure confidence in the accuracy of criminal judgments, reduce the risk of prosecuting or convicting innocent persons, and alleviate burdens on all segments of the criminal justice system. Any rule that excludes voluntary, reliable confessions from evidence therefore imposes substantial costs and carries a heavy burden of justification.

The rule adopted by the court of appeals imposes a perpetual ban on police-initiated custodial interrogation after a suspect's invocation of the *Edwards* right to counsel. That rule would seriously impede effective law enforcement by requiring exclusion of voluntary, reliable confessions made after otherwise valid waivers of *Miranda* rights. Moreover, because many offenders commit multiple crimes, and it is common for a person under suspicion in connection with one offense to have invoked the right to counsel at some previous point in a separate case, a rule that

permanently forecloses all police-initiated interrogation of such persons while they remain in custody would impose a particularly high cost in restricting law enforcement efforts.

Any benefit that might be obtained by applying the prophylactic rule of *Edwards* in this context does not outweigh the costs associated with the restriction of police investigations and the suppression of probative, voluntary confessions. A request by the police to interrogate a suspect on a new subject more than five months after the suspect's invocation of his right to counsel, and after the suspect has entered a guilty plea on the charges that prompted the request for counsel, poses very little danger that the suspect will be badgered into making a statement when he would otherwise remain silent. Moreover, the police are in any event required to provide suspects with *Miranda* warnings prior to any interrogation, and compliance with that requirement will ensure that suspects do not give statements to the police unless they freely choose to do so. In these circumstances, applying the *Edwards* rule would not afford any significant protection to the suspect's constitutional rights. In light of the high cost of restricting police investigations and excluding voluntary confessions, the prophylactic rule of *Edwards* should not be extended to cases like this one, in which the concerns underlying that rule are not implicated. Cf. *Berkemer* v. *McCarty*, 468 U.S. 420, 437 (1984) ("Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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